IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1913

CHARLES HABRON; WILLIAM ESCH;
FRANK GLORIOSO; RUDY SPENCER;
JOHN SIGLER, JR.; and WALTER HAWSE,
Appellants,

v.

HARVEY A. EPSTEIN, Commissioner of Labor and
Industry of the State of Maryland; and
BALTIMORE BUILDING AND CONSTRUCTION
TRADES COUNCIL, *Appellees.*

ON APPEAL FROM A DECISION OF THE
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RESPONSE TO MOTIONS TO AFFIRM

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On May 4, 1976, Appellants, Walter Hawse and John Sigler, Jr. filed an appeal to this Court. On May 6, 1976, Appellants, Charles Habron, Rudy Spencer, Frank Glorioso

and William Esch likewise filed an appeal to this Court. On July 2, 1976, the Appellants filed a jurisdictional statement with this Honorable Court.

On July 30, 1976, Appellee, Baltimore Building and Construction Trades Council, filed a Motion to Affirm the decision of the Three-Judge Court entered on April 7, 1976. On August 2, 1976, Appellee, Harvey A. Epstein, filed a Motion to Affirm the April 7, 1976 Order. Pursuant to Rule 16 of the United States Supreme Court, Appellants hereby respond to said Motions to Affirm.

STATEMENT OF THE CASE

This has been adequately set forth in Appellants' Jurisdictional Statement and in Appellees' Motion to Affirm.

QUESTION PRESENTED

Do the issues raised by Appellants amount to a substantial federal question so that further argument before this Honorable Court is necessary?

ARGUMENT

MARYLAND ANNOTATED CODE, ART. 100, § 105A, DENIES EQUAL PROTECTION OF THE LAW TO A PERSON CLASSIFIED AS A HELPER BY PROHIBITING HELPERS FROM BEING EMPLOYED IN PUBLIC WORK PROJECTS VALUED OVER $500,000.

The district court utilized the "rational basis" test for equal protection cases in determining that § 105A was not

unconstitutional. The court formulated that test primarily in terms of the language of *McGowan v. Maryland*, 366 U.S. 420 (1961):

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425-26. This broad language is nonetheless tempered by admonitions that a court's considerations in equal protection cases "must be something more than an ingenious academic exercise in the conceivable." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-89 (1973). Or, as this Court stated only last term:

> [T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.

Weinberger v. Wisenfeld, U.S. , 95 S. Ct. 1225, 1233 (1975). Further, this Court,

> need not equal protection cases accept at face value assertions of legislative purpose, when an examination of the legislative scheme and its history demonstrate that the asserted purposes could not have been a goal of the legislation.

95 S. Ct. at 1233, n. 16.

The district court read *McGowan* in its very broadest sense in finding at least three rational purposes for § 105A: (1) that it promoted work safety; (2) that it prevented unemployment and encouraged skilled training; and (3) that it aided apprentice programs. Only under the broadest construction of *McGowan* could the court reach those conclusions. When *McGowan* is tempered by *Weinberger*, it is evident that none of the asserted purposes are anything more than "a mere recitation of . . . benign, compensatory purpose[s] . . . ."

According to the testimony of appellee at trial in the district court, the adoption of § 105A was precipitated by an incident in Anne Arundel County, Maryland, where a school was constructed with an inordinate number of helpers versus carpenters. (A helper's primary function is to assist skilled laborers under those laborers' directions.) Appellee stated that the situation mentioned above "was so dramatic that it precipitated the legislation [§ 105A] and all that ensued, and that is probably why we are sitting [in the district court] today." (Transcript of Testimony of Harvey A. Epstein, November 20, 1975, at 14). Yet, in its opinion, the court below did not refer to this incident at all but found three general principles upon which to sustain the constitutionality of the statute.

Appellee's testimony indicates that the purpose of § 105A was to prevent a recurrence of the situation which existed at the Anne Arundel school. To achieve this goal, the legislature excluded all helpers from public works projects valued over $500,000. This blanket exclusion does not rationally achieve the goal set by the legislature, for instead of regulating the number of helpers who may be

employed in public works projects, § 105A simply prohibits their employment. Thus, the actual effect of the statute bears no relationship to the goal it was designed to achieve.

In this regard, the case at bar is similar to several cases, wherein this Court and other courts, have found state statutes violative of the equal protection clause. In *Morey v. Doud*, 354 U.S. 457 (1957), the Court invalidated an Illinois statute regulating the sale of money orders but exempting money orders sold by the American Express Company from the terms of the statute. The state contended that the law was designed to protect the public, and that the solvency and high financial standing of American Express made the legislative classification reasonable. This Court, however, noted that the statute was intended to be permanent; if American Express became insolvent or lost respectability, it would still be exempt from regulation. Thus, the "remote relationship of the statutory classification to the Act's purposes . . . and the creation of a closed class by the singling out of money orders of a named company, with accompanying economic advantages," made the statute unconstitutional. 354 U.S. at 469.

In the case at bar, not only is the effect of the law not related to the statute's purpose, but also the statute creates a closed class of workers-apprentices who alone may gain employment in public works projects valued over $500,000. Such a distinction immediately works to the economic advantage of all apprentices, and to the detriment of helpers.

Similarly, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), this Court struck down a Louisiana

law preventing illegitimate children from recovering workmen's compensation unless the surviving legitimate children did not exhuast the available funds. The Court held that the inferior classification of illegitimate children bore no significant relationship to the purposes of the workmen's compensation statute.

Ruling that a flat ban against employment of a classification of persons was a form of an irrebuttable presumption, and thus constitutionally infirm, the court in *Beazer v. New York Transit Authority*, 399 F. Supp. 1032 (S.D.N.Y. 1975), invalidated the exclusion from any form of employment with defendants of all former heroin addicts participating in methadone maintenance programs, and even former heroin addicts who had successfully concluded their participation in a methadone program. Such a broad, sweeping statute is similar to § 105A, which arbitrarily excludes all helpers from public works projects valued over $500,000, regardless of their ability, and despite the fact that they had always been qualified for such employment before the passage of the statute. Thus, § 105A constitutes the same kind of flat ban creating an irrebuttable presumption as did the regulation in *Beazer*.

Another "flat ban" was invalidated in *Sugarman v. Dougall*, 413 U.S. 634 (1973), where a New York law provided that only United States citizens could hold permanent positions in the competition class of the state civil service. This Court, holding the statute violative of the equal protection clause, ruled that the restriction "sweeps indiscriminately." 413 U.S. 643. See *Hampton v. Mow Sun Wong*, 44 U.S.L.W. 4737 (U.S. June 1, 1976) (Civil Service Commission regulation barring noncitizens from federal civil

service employment violates due process clause of fifth amendment).

Not only does § 105A constitute an indiscriminate ban against helpers which bears no relation to its actual purpose, the statute also does not support the rationale conceived by the district court to sustain it. In his dissent, Judge Watkins thoroughly debunked the three major conceptions relied upon by the court as rational purposes for § 105A. Judge Watkins noted that safety could not be a rationale for the statute since the act only applies to public works jobs exceeding $500,000, and does not apply to private construction. Further, the Commissioner of Labor and Industry testified that the statute did not refer to safety, and that the work of helpers was entirely satisfactory. Judge Watkins also pointed out that the claim that the statute reduced unemployment and encouraged skilled training was untenable, since the age of most helpers made it highly unlikely that they would become apprentices. Finally, the fact that the unions themselves opposed the statute undercut the premise that the statute would promote the welfare of the industry. (Dissent of Watkins, J., at 2-5.)

A further attack upon § 105A can be fashioned by considering the basic distinctions between helpers and apprentices. The distinctions are so minimal as to make it difficult to determine any appreciable difference between the two classes. Basically, helpers always remain helpers, assisting skilled laborers, while apprentices train to become skilled laborers by assisting their superiors. This is a minimal distinction at best. Indeed, the two classes appear to be similarly situated, and discrimination between similarly situated classes cannot be sustained.

In *Reed v. Reed,* 404 U.S. 71 (1971), this Court invalidated an Idaho statute giving preference to men over women as administrators of decedents' estates, saying the act violated the fourteenth amendment "[b]y providing dissimilar treatment for men and women similarly situated . . . ." 404 U.S. at 77. In *Eisenstadt v. Baird,* 405 U.S. 438 (1972), where appellee was convicted for administering contraceptives to an unmarried person, the Court found no rational basis for a statute prohibiting the administration of contraceptives to unmarried persons, but allowing it for married persons. This distinction between similarly situated classifications was thus held to violate the equal protection clause.

Both cases show that, where two classes are substantially similar, discrimination in favor of or against one class is sufficient to violate the fourteenth amendment. Such reasoning, applied to the case at bar, requires that § 105A be held unconstitutional for discriminating in favor of apprentices and against helpers. *Accord, Lindsey v. Normet,* 405 U.S. 56 (1972) (double bond requirement for tenants but no other class of appellants violates equal protection).

Appellants are cognizant of several cases holding state statutory classifications permissible under the fourteenth amendment. However, all of the leading cases can be distinquished from the case at bar. In *Kotch v. Board of River Port Pilot,* 330 U.S. 552 (1947), the Court upheld a Louisiana law which, in effect, only permitted friends and relatives of river pilots to become river pilots themselves. The Court in stating its reasons, made clear its decision was limited to the unusual factual situation before it.

> [I]t seems to have been accepted at an early date that in pilotage . . . competition for appointment . . . adversely affects the public interest . . . .

330 U.S. at 561. Further, "considering the entirely unique institution of pilotage in the light of its history in Louisiana," the Court was compelled to sustain the statute. 330 U.S. at 563.

In *Linehan v. Waterfront Commission,* 116 F. Supp. 683 (S.D. N.Y. 1953), *aff'd,* 347 U.S. 439 (1954), an act of New Jersey and New York required longshoremen to register with, and seek employment through, the Waterfront Commission. In upholding the statute, the district court noted that the act "resulted from the abundant evidence uncovered of grave abuses in the existing system of hiring longshoremen . . . ." 116 F. Supp. at 689.

Two other cases can be distinguished by the fact that they relate to economic assistance in the form of Social Security and Aid to Families with Dependent Children (AFDC). Such enormous programs having nationwide implications, require a high degree of government administration and regulation. Thus, in this field, the Court will give the Government greater deference when scrutinizing classifications made for administrative convenience, as it did in *Weinberger v. Salfi,* 422 U.S. 749 (1975), and *Dandridge v. Williams,* 397 U.S. 471 (1970). These cases clearly turned on the "administrative difficulties of individual eligibility determinations," 422 U.S. at 765, and the relaxed standard of review of *Dandridge* and its progeny only lay down the governing principle for disposing of constitutional challenges to classifications in "social welfare legislation." 422 U.S. at

756. The holdings of these cases should not control in the instant case, since the underlying policy basis for the decisions is not present here.

This Court, in invalidating the Maryland statute, should adhere to the language found in *Deal v. Board of Education,* 369 F.2d 55, 59 (6th Cir. 1966):

> The principle . . . is that the state may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. Since it is freedom of choice that is to be protected, it is not necessary that any particular harm be established if it is shown that the range of individual options has been constricted without the high degree of justification which the Constitution requires. It is harm enough that a citizen is arbitrarily denied choices open to his fellows.

CONCLUSION

The Maryland statute has been construed by the United States District Court for the District of Maryland to deny the Appellants the equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution. This Court should require further argument to be heard in this matter and reverse the decision below.

Respectfully submitted,

JOHN J. BISHOP, JR.

Attorney for Appellants.